17146

United States Circuit Court of Appeals

SECOND CIRCUIT.

RCA Manufacturing Company, Inc.,
Complainant-Appellant and Appellee,

—against—

Paul Whiteman, W. B. O. Broadcasting Corporation,
Defendants-Appellees and Appellants,

and

Elin, Inc.,
Defendant.

REPLY BRIEF OF DEFENDANT-APPELLANT, W. B. O. BROADCASTING CORPORATION TO ANSWERING BRIEFS OF RCAM AND WHITEMAN.

POINT I.

The restrictive notices placed upon RCAM records sold subsequent to December 1932 did not create an enforceable servitude in favor of either RCAM or Whiteman.

(Reply to Point I of Whiteman Ans. Brief and Point III of RCAM Ans. Brief.)

RCAM and Whiteman contend that this Court should give to a notice upon a phonograph record the same or greater effect than a copyright notice, giving rights not for the twenty-eight-year period provided by the copyright statutes, but in perpetuity. They claim that the notice operates as an equitable servitude, enforceable in their favor in perpetuity. Though couched in the language of license, the attempted restriction is sought to be

imposed in transactions involving absolute sale (431). This, it is submitted, cannot be done, especially where, as here, the records have come into the hands of an ultimate consumer.

Professor Chafee, the champion of equitable servitudes on chattels, states (Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 1013) that he is much less convinced of the desirability of equitable servitudes on chattels at the close of his inquiry than when he began, and concedes (pp. 986, 996) that, in the ordinary case, the financial interest of the manufacturer does not justify the enforcement of use restrictions upon chattels which have come into the hands of ultimate consumers. He states (p. 987) that against the interests of the manufacturer must be weighed those of the purchasing and general public. The detriment and inconvenience to the public of use restrictions enforceable in perpetuity, is clear.

RCAM advances no reason for the enforcement of the restrictions in its favor other than its belief that it could make more money if it were permitted to control the commercial use of its records. The same can be said of every manufacturer of chattels.

Whiteman urges the additional reason that the enforcement of the restrictions in his favor would encourage art and its dissemination to the public through phonograph recordings. This is doubtful. It certainly was not proved at the trial and it is hard to believe that Whiteman, who has been guaranteed and has actually received as high as \$100,000 a year for making records (707, 708), is likely to give up this lucrative field.

Art. 1, Sec. 8, cl. 8, of the Constitution entrusts to Congress the encouragement of the arts by securing to authors the exclusive right to their works. Though the subject has been before it for many years, and repeated hearings have been held, Congress has thus far not seen fit to afford protection to performances and recordings. Is this not an attempt to have tne courts circumvent Congressional policy or usurp its functions by the device of equitable servitudes?

RCAM and Whiteman attempt to dismiss the authorities relied upon by W. B. O. on the ground that they deal with price restrictions, tying restrictions or territorial restrictions on use, which are admittedly unreasonable (p. 26, RCAM's ans. brief; pp. 1-2, Whiteman's ans. brief).

Use restrictions, operating in perpetuity and burdening the free use of the chattel in the hands of consumers, are more onerous and inconvenient to the public than price-fixing. The consumer of a chattel subject to a price restriction is at least free to use it if he can afford to purchase it. Tying and territorial restrictions are "use restrictions". It is no more burdensome to say that the public cannot use a product in a particular locality than to say that it cannot use it for a particular purpose. Nor are tying restrictions more unreasonable than restrictions against commercial use. Use, price and tying restrictions are all devices instrumental to monopoly. The enforcement of the use restriction in this case would enable RCAM and Whiteman to exercise a regulatory control over industries dependent upon the commercial use of records.

Apart from the *Waring* case (Pa.), the cases cited by RCAM and Whiteman do not support their contentions.

Waring v. *Dunlea,* 26 F. Supp. 338 (D. C., E. D. N. C., 1939), does not involve a sale of a record. The electrical transcriptions were made in limited quantities and licensed, not sold, for the limited purpose of use upon a single advertising program. One wrongfully acquiring such transcriptions can, upon familiar principles, be restrained from using them.

Lorillard v. *Weingarden,* 280 Fed. 238 (D. C., W. D. N. Y., 1922), involved an application for a temporary injunction. The products threatened to be sold were stale cigarettes and were to be marketed under the manufacturer's standard-brand name. The case is really one of unfair competition—the palming-off of a deteriorated

product as that of a standard brand. Furthermore, there was an issue of fact whether the defendant had not expressly agreed that he would not sell the cigarettes in the United States.

In re Waterson, Berlin & Snyder Co. v. *Irving Trust Co.*, 48 F. (2d) 704 (C. C. A. 2d, 1931), holds that the trustee of a bankrupt publisher should not sell copyrights separate and apart from the written royalty contract between composer and publisher which gave rise to the very copyright being sold. It is a contract case and involves neither the rights of sub-purchasers nor chattels or servitudes.

New York Bank Note Co. v. *Hamilton B. N. Co.*, 180 N. Y. 280 (1905), deals with the contractual rights of a printer whose labor has combined with that of the manufacturer in devising a press adapted to the printing of perforated strip tickets. The case was reversed upon procedural grounds, but contains a dictum that a contract between the printer and the manufacturer by which the latter agreed not to sell presses to others, for the purpose of printing strip tickets, was not void as in restraint of trade. The case in no way concerns the right of a manufacturer or vendor of an ordinary chattel to continue, by equitable servitude, his control over the product after he has sold it on the open market.

In re Rider, 16 R. I. 271, 15 Atl. 72 (1888), and *Murphy* v. *Christian Press Assoc. Pub. Co.*, 38 App. Div. 426 (1899), like the *Waterson* case, dealt with contracts and copyrights, not chattels or servitudes.

Montgomery Enterprises v. *Empire Theatre Co.*, 86 So. 880 (Ala., 1920), deals with films rented, not sold.

Great Lakes etc. Distributors Co. v. *Scranton Coal Co.*, 239 Fed. 603 (C. C. A. 7th, 1917); *Oregon Steam Nav. Co.*

v. *Winsor*, 20 Wall. 64 (1874); *Dunlop* v. *Gregory*, 10 N. Y. 241 (1851); and *Stemmerman* v. *Kelly*, 150 App. Div. 735 (1st Dept., 1912), are all actions between the original parties to a contract and in no way involve rights of subsequent purchasers to use chattels.

De Mattos v. *Gibson*, 4 De G. & J. 276, 45 Rep. 108 (1858), and *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* [1926], A. C. 108, deal with the rights of a charterer where the ship was afterwards sold.

Werderman v. *Société Générale d'Electricité*, 19 Ch. D. 246 (1881), is a case involving a charge on a patent.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175; 305 U. S. 124 (1938), was an action for a patent infringement and turned upon the fact that the restricted device was not manufactured under the patent since the manufacturer was licensed to manufacture and sell only for non-commercial use.

Dickerson v. *Tinling*, 84 Fed. 192 (C. C. A. 8th, 1897), was a case of patent infringement.

Independent Wireless Telegraph Co. v. *Radio Corporation of America*, 269 U. S. 459 (1925), involved only a point of practice as to the joinder of parties.

As has been shown, it is the principle enunciated in *Bobbs-Merrill Co.* v. *Straus*, *Straus* v. *Victor Talking Machine Co.*, *Motion Picture Co.* v. *Universal Film Co.* and other cases cited by W. B. O. (Point I, W. B. O.'s Main Brief, pp. 9-16) which governs this phase of this case. These cases clearly establish that equitable servitudes attempting to restrict price or use are unreasonable, are in restraint of trade and are contrary to the public policy of this country which favors freedom of competition and the free alienation of chattels sold upon the open market in the ordinary channels of trade.

POINT II.

W. B. O. is not competing unfairly with RCAM or Whiteman.

(Reply to Point II of Whiteman Ans. Brief and Point IV of RCAM Ans. Brief.)

RCAM and Whiteman, without the authority of any statute, are claiming the right in perpetuity to levy tribute upon purchasers for the use of records after their outright sale in the ordinary channels of trade. They claim this, irrespective of any legend or notice on the records, on the alleged ground of unfair competition.

The issue of unfair competition, as presented in this case, should not be confused with any alleged deception of the public. W. B. O. denies that it has engaged in any deceptive practices, and concedes that any attempt at "palming off" is subject to appropriate injunction (Point II, W. B. O.'s Main Brief, pp. 24-25).

The gist of RCAM's claim of unfair competition is that (a) radio stations make "phenomenal profit" from the broadcasting of records; (b) radio stations purchase RCAM records at "nominal cost"; and (c) RCAM could make greater profits and secure the services of more artists if radio stations did not broadcast records. Whiteman merely claims that the broadcasting of his records reduces his earning power. In short, RCAM and Whiteman are not satisfied with their respective earnings—so they claim "unfair competition".

W. B. O. denies that its broadcasts of records damages either RCAM or Whiteman and asserts that it is not in competition with either of them (Point II (b) (c), W. B. O.'s Main Brief, pp. 25-30). Should the Court conclude otherwise, it is none-the-less clear that the law gives no relief for pecuniary loss resulting from competition unless the competition is "unfair". Neither W. B. O. nor White-

man point out anything "unfair" in the alleged competition. They merely reiterate in various ways their claim of loss of profits. If RCAM and Whiteman do not want records broadcasted they should either not make and sell them on the open market or they should persuade Congress that they are a specialized group needing special protection. RCAM and Whiteman have failed in their attempts for legislative relief and they now come into court claiming inequity, when there is none.

Despite the assertion of RCAM and Whiteman to the contrary, the cases do not support the granting of equitable relief in such a case. *International News Service* v. *Associated Press,* 248 U. S. 215 (1918), the keystone of both RCAM's and Whiteman's assault, did not involve the physical use of a chattel sold in the ordinary channels of trade and is an entirely different type of case. In that case one news gathering agency sought to crib the work of another and sell it as its own to the same class of persons serviced by the second. W. B. O.'s interest in records is that of a consumer. It wants to perform the records as recorded performance, giving full credit by notice to the performing artist. It does not want to sell records to the general public or to anybody else. Nor does it want to extract the contents from them and palm them off deceptively upon the public as was done in *Fonotipia Limited* v. *Bradley,* 171 Fed. 951 (C. C., E. D. N. Y., 1909).

Associated Press v. *KVOS,* 80 F. (2d) 575 (C. C. A. 9th, 1935), reversed on jurisdictional grounds, 299 U. S. 269 (1936), is but the application of the *Associated Press* case to a radio station engaged, as the Court found, in the further business of gathering and disseminating news with paid advertising matter. (But see opinion of District Court, 9 F. Supp. 279 (D. C., W. D. Wash., 1934) which held that the *Associated Press* case did not apply.)

This Court has repeatedly refused to extend the doctrine

of the *Associated Press* case beyond the subject matter to which it related (Point II (a), W. B. O.'s Main Brief, pp. 17-25).

Uproar Co. v. *National Broadcasting Co.*, 81 F. (2d) 373 (C. C. A. 1st, 1936), cert. den. 298 U. S. 670 (1936), was decided upon the basis of an implied negative covenant in the employment contract of a radio comedian with a radio advertiser.

Twentieth Century Sporting Club, Inc. v. *Transradio Press Service, Inc.*, 165 Misc. 71, 300 N. Y. Supp. 159 (1937), and *Pittsburgh Athletic Club* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (D. C., W. D. Pa., 1938), involved parties who were in direct competition. Neither concerned chattels sold and published. One of them involved definite deception and contract violation on the part of ticket holders to an exhibition. They are directly contrary to the law of this Circuit as decided in *National Exhibition Co.* v. *Teleflash*, 24 F. Supp. 488 (D. C., S. D. N. Y., 1936).

Coca-Cola Co. v. *Old Dominion Beverage Corp.*, 271 Fed. 600, 604 (C. C. A. 4th, 1921) was a trademark and unfair competition case. The defendant was found guilty of unfair competition by copying the ornamentation of plaintiff's soft-drink bottles and was found guilty of trademark violation by the use of the name "Taka-Cola".

The "ticker" cases, the "ticker-scalper" cases and the "trading stamp" cases have been held inapplicable to cases involving chattels. See *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24 (C. C. A. 6th, 1907) and *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 135 Fed. 833 (C. C., R. I., 1904). In the former case the Court said at page 31:

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> "The trading stamp and railroad ticket cases * * * likewise rest upon the peculiar character of the

> property rights involved. Neither concern the buying and selling of articles of general commerce, and both relate to things in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic."

Despite RCAM's and Whiteman's contention to the contrary, *Cheney Bros. v. Doris Silk Corp.*, 35 F. (2d) 279, 280, and *Millinery Creators' Guild v. Federal Trade Commission*, 109 F. (2d) 175, 177, are authorities supporting W. B. O.'s position. RCAM urges that the *Cheney, Millinery Guild* and *Auto-Lite* cases dealt only with the imitation of chattels and not their physical use. By extracting phrases from these cases, dissociated from the rest of the context, RCAM would have the Court believe that property in unpatented chattels is protected after sale of the chattel. W. B. O. submits that the Court had no such thing in mind. As owner of the chattel, a manufacturer has a property right in the idea or design therein embodied, but the property right is coextensive with the chattel and passes with the title of the chattel, on its sale.

Although RCAM states that under the *Cheney, Millinery Guild* and *Auto-Lite* cases one may make an exact recorded imitation of its records, it must be clear to the Court that such would also be outlawed if the RCAM and Whiteman claims are upheld. Logically, if the playing of a recording is held to be an infringement of property rights of RCAM and Whiteman, a substantial copying by "imitation" would also be an infringement if the copyright law furnishes any analogy.

Since the writing of our main brief, there has been officially reported another unfair competition decision by this Court, supporting the *Cheney* case. It is *Jackson v. Quickslip Co.*, 110 F. (2d) 731, 732 (1940), involving alleged copyright infringement and unfair competition with respect to a greeting card. The Court held that the idea incorporated in the card, although original, con-

tained "nothing of literary or artistic production", and continued:

> "As to details there is no imitation, no palming off. The case fails on unfair competition."

Accordingly, the latest pronouncement of this Court is that in the absence of a copyright or patent there must ordinarily be a "palming-off" to warrant a finding of unfair competition. There was no copyright, patent, palming-off, or "unfairness" proved by either Whiteman or RCAM and the case, therefore, fails on unfair competition.

POINT III.

Whiteman has no common-law rights in performances nor in records thereof.

(Reply to Point III of Whiteman Ans. Brief.)

Whiteman has been unable to produce a single case, prior to the *Waring* decision in 1937, where common-law rights in performances have been so much as suggested. It is submitted that this Court should refuse to adopt the innovations there set forth (Point III, W. B. O. main brief, pp. 30-36).

Assuming, but not admitting, that the common-law concept under which literary property is recognized is not restricted to literary creations, it does not follow that musical performances should be accorded common-law protection. In counterbalance to the interests of performers there must be weighed the interests of the composers, the authors and the consuming public. The placing of the burden on the public of securing the consents of every musician and performer who participated in the making of records is one which should not be undertaken by the courts. If warranted, it belongs to the province of Congress.

POINT IV.

RCAM and Whiteman, upon the public sale of the records, lost by publication their alleged common-law rights therein.

(Reply to Point IV of Whiteman Ans. Brief and Point II of RCAM Ans. Brief.)

W. B. O. and Whiteman claim to have prevented "publication" because: (1) a legend was placed on the label to the effect that the records were not licensed for broadcasting; (2) records and recorded performances are, by their nature, "not publishable"; and (3) records and recorded performances are not "copyrightable".

It has long been settled that the sale to the public of copies of a work constitutes publication. (See Weil, American Copyright Law (1917) pp. 150-151, Ladas, International Protection of Literary and Artistic Property (1938), pp. 689, 690, 735, and Point IV, W. B. O.'s main brief. Here the record sales ran into millions of copies. Despite RCAM's and Whiteman's contention to the contrary, the intention of the party is immaterial if he performs the acts constituting publication. (See cases cited Point IV(b), W. B. O.'s main brief, pp. 39-42, and *Carns* v. *Keefe Bros.*, 242 Fed. 745 (D. C., Mont., 1917).) Otherwise, there would be no point in copyrighting a literary work.

The cases cited by RCAM and Whiteman, apart from the *Waring* case (Pa.), do not support their contention. *Werckmeister* v. *American Lithographic Co.*, 134 Fed. 321 (C. C. A. 2d, 1904), and *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284 (1907), deal with the abandonment of copyright and hold that the exhibition of a copyrighted picture without attachment of copyright notice is not such a publication as to void the copyright where the public is admitted only on the payment of a fee and there are restrictions against copying. *International News Service* v. *Associated Press*, 248 U. S. 215 (1918), was a suit for

unfair competition and deals with at most "quasi property" in news. *Fonotipia Limited* v. *Bradley*, 171 Fed. 951 (C. C., E. D. N. Y., 1909), is another unfair competition case turning on the presence of fraud and deceit (p. 4, W. B. O.'s Ans. Brief). *Waring* v. *Dunlea*, 26 F. Supp. 338 (D. C., E. D. N. C., 1939), did not involve a sale of the electrical transcription and is a clear case of so-called "limited" publication.

Whiteman's contention (pp. 13-15, Whiteman's ans. brief) that musical performances embodied in phonograph records are not "publishable", amounts to a claim that the alleged rights of a musician are superior to those afforded creators of literary property at common law.

Universal Film Manufacturing Co. v. *Copperman*, 218 Fed. 577 (C. C. A. 2d, 1914), cert. den. 235 U. S. 704 (1914), upon which he relies does not support his contention. The case clearly holds that a sale of an uncopyrighted motion-picture film vested the performing rights in the purchaser, and that any attempt to restrict the right is void.

The reasoning advanced by RCAM and Whiteman force them to take the position that, since records and recorded performances have been denied the benefit of the copyright statutes, their alleged rights are greater than they would have been if granted a copyright privilege. Hence, RCAM and Whiteman argue that their alleged rights are not lost by publication.

Ideas, sales plans, schemes, dress designs, accounting systems and architects' drawings are not copyrightable, yet common-law rights therein are lost upon publication (Point IV(a), W. B. O.'s Main Brief, pp. 36-39).

Whatever may have been the law of England prior to the enactment of the Statute of Anne, the American cases unanimously hold that the common law introduced into this country did not protect literary property, and property analogous to literary property, after its publication.

> *Wheaton* v. *Peters*, 8 Pet. 591 (1834);
> *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 188 (1909);

> *Palmer* v. *DeWitt*, 47 N. Y. 532 (1872);
> *Parton* v. *Prang*, Fed. Cas. No. 10,784 (C. C., Mass., 1872);
> Cases, Point IV, W. B. O.'s main brief.

That this was the understanding of the framers of the Constitution is shown by Article 1, Sec. 8, cl. 8, wherein Congress is empowered:

> "*To promote* the Progress of Science and useful Arts, *by securing for limited Times* to Authors and Inventors the *exclusive Right* to their respective Writings and Discoveries"; (Emphasis added.)
>
> [That the term "Authors" was used in a sense embracing others than those afforded copyright protection under the Statute of Anne is clear (*Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53 (1884).]

At common law, an author always had the right to publish his work in common with everybody else. The Copyright Act was designed merely to confer on him an "exclusive" right—a monopoly in which no one can share without his permission (*In re Brosnahan, Jr.*, 18 Fed. 62, 65 (C. C., W. D. Mo., 1883).

RCAM and Whiteman argue that what is not copyrightable is protected in perpetuity, irrespective of publication. If this were so, the best method Congress could have adopted for encouraging the arts would have been to repeal the copyright statutes. Congress, however, considered it necessary to enlarge the scope of the copyright statutes to protect those not covered by the original act, which protected only maps, charts and books. In 1802 it added prints, etchings and engravings; in 1831, musical compositions; in 1856, dramas; in 1865, photographs; in 1870, paintings, drawings, chromos, statues, etc.; in 1891, the rights of citizens of certain foreign countries to copyright protection; in 1897, performing rights to owners of copyrighted music; in 1909, lectures, sermons and ad-

dresses, and mechanical rights to owners of copyrighted music; in 1912, motion pictures.

Similarly, the English Parliament felt called upon to extend the protection afforded by the Statute of Anne (1709) which protected only books. In 1734, it added engravings; in 1814, sculpture; in 1852, prints; 1833 and 1842, performing rights in copyrighted music and drama (such works having been construed as "books" by the courts in 1777 and 1788); in 1911, recordings were added for the manufacturers and mechanical rights given to copyright owners of music; in 1925, the Musical Performers' Protection Act, creating no rights but giving summary remedies to persons whose performances were recorded without their consent.

Obviously, if at common law these works were protected in perpetuity, Congress and Parliament have inadvertently for the past two hundred years been discouraging, instead of—as they thought—encouraging, the progress and development of the arts.

Drone (1879), relied on by RCAM and Whiteman, does not correctly state the law. Copinger (1936) Law of Copyright (7th ed.), pages 3, 4, states that:

> "* * * [*Donaldson* v. *Beckett*] must be taken to have finally decided that publication put an end to the common law perpetual right, and that after publication an author had to base his claim for protection upon his statutory right, *if any*. But, prior to the Copyright Act, 1911, a common law copyright in unpublished works was constantly admitted." (Emphasis added.)

POINT V.

The injunction restraining W. B. O. from interfering with RCAM's agreement with its distributor is improper; and the decree is inconsistent with the pleadings.

(Reply to Point VI of Whiteman Ans. Brief and Points V and VI of RCAM Ans. Brief.)

(a) The distributor's agreement was not binding on W. B. O.

RCAM distorts the testimony in an effort to show W. B. O.'s knowledge of RCAM's agreement with Bruno-New York, Inc. and an arrangement to evade such agreement (RCAM Ans. Brief, pp. 35-36). The evidence is that W. B. O. buys from stores and receives a discount off the retail price (304), pays the stores—in this case, the Commodore Music Shop (363),—although the records are physically delivered to W. B. O. by Bruno-New York, Inc. with whom W. B. O. has no arrangement (362). It is a fair inference that the retailer was anxious to enhance the popularity of the records by having them broadcast by W. B. O. and thereby to profit from increased record sales, and accordingly arranged for an immediate delivery of the RCAM's weekly releases direct by the distributor. This does not smack of any transparent arrangement designed to violate the distributor's agreement, as is argued by RCAM. Furthermore, W. B. O. purchased from a retailer who had no contract with RCAM and was authorized to sell them to W. B. O. (*Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659 (1895).

The case at bar is not one for damages for maliciously inducing a singer to breach her contract with another (*Lumley* v. *Gye*, 2 El. & Bl. 216); it is not a case of

inducing a school to buy its books from the defendant instead of from the plaintiff (*Heath v. American Book Co.*, 97 Fed. 533 (C. C., W. Va., 1899); nor does it involve trading stamps (*Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800 (C. C., R. I., 1904).

General Talking Pictures Corp. v. Western Electric Co. Inc., 304 U. S. 176; 305 U. S. 124 (1938), is of no help to RCAM because it involved the use of an article manufactured "outside of the patent".

(b) The relief granted RCAM in the decree is inconsistent with the pleadings.

RCAM's argument that the "admissions" served by W. B. O., pursuant to written demand of RCAM under 36 and 37(c) of the Federal Rules of Civil Procedure, cured the defect in RCAM's pleadings is patently unsound. Moreover, the authorities cited at page 38 of the RCAM answering brief are all distinguishable on their facts, and the judgment in each of the cases (except one accounting action) dealt with the identical property specifically described in the pleadings. In the case at bar, the decree, except as to the Whiteman records, enjoins the use of entirely different property than is specifically described in the complaint and bill of particulars.

(c) The relief granted Whiteman in the decree is inconsistent with the pleadings.

None of the authorities relied on by Whiteman in Point VI-A of his answering brief is in point because none is decided under old Equity Rule 30, promulgated in 1912, which Whiteman concedes governs (p. 21, Whiteman Ans. Brief). That rule provides for cross-claims against the plaintiff but not as between co-defendants.

Moreover, no cross-claim against W. B. O. was ever asserted in the pleadings or at the trial.

Respectfully submitted,

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